FILED BY CLERK
OCT 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

HILDA A., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DAKOTA A., and BOBBIJO A., Appellees.	2 CA-JV 2009-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD-200700142

Honorable Joseph R. Georgini, Judge

REVERSED

Nicole L. Severson
Maricopa
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Chief Judge.

¶1 Appellant Hilda A., also referred to as Maria A., appeals from the juvenile court's order of February 24, 2009, terminating her parental rights to her children, Dakota, born in February 1997, and Bobbijo, born in March 1999, on the grounds of mental illness, *see* A.R.S. § 8-533(B)(3), and length of time in care, *see* § 8-533(B)(8)(a), (c). Hilda challenges the court's finding that the Arizona Department of Economic Security (ADES) made diligent efforts to reunify her with her children, arguing that finding was not supported by clear and convincing evidence. We agree and reverse.

¶2 In reviewing the juvenile court's order, we view the evidence in the light most favorable to sustaining the court's order. *See In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994). Child Protective Services (CPS) received at least four reports about Hilda's family, which had involved another, older child, between 1999 and 2007. The reports related instances of neglect, substance abuse, and domestic violence. In August 2007, CPS was contacted after Hilda called the principal of the school Dakota and Bobbijo attended and told her Hilda would not be coming to pick them up because "she no longer wanted the children and . . . was not fit to be the[ir] mother." The children were placed in foster care and then with the school principal. ADES filed a dependency petition. At a combined preliminary protective and initial dependency hearing on August 27, 2007, Hilda stated she was willing but unable to care for the children, and the court adjudicated the children dependent as to her. The children were adjudicated dependent

as to the father on October 17, 2007, when he failed to appear for an initial dependency hearing.[1]

¶3 The initial case plan goal was reunification. In furtherance of that goal, ADES was to provide, and Hilda was to participate in, a panoply of services, including random drug testing, parenting classes, parent-aide instruction, supervised visitation, a psychological evaluation, and any services recommended as a result of that evaluation. Following a permanency planning hearing in August 2008, the juvenile court changed the case plan goal from reunification to severance and adoption, directing ADES to file a motion to terminate both parents' rights. ADES filed its motion shortly thereafter, alleging as grounds for terminating Hilda's parental rights that she suffered from a mental illness and/or deficiency and was unable to discharge her parental responsibilities; she was unable to parent the children because of "chronic abuse of dangerous drugs, controlled substances, and/or alcohol"; and the children had been in court-ordered care for nine months or longer and Hilda had "substantially neglected or willfully refused to remedy the circumstances" that caused the children to remain out of the home. On the second day of the three-day termination hearing, the court permitted ADES to amend the motion to include the allegation that Hilda's children had been out of the home in court-ordered care for fifteen months or longer and

[1]The children's father's rights were severed after he relinquished those rights, and he is not a party to this appeal.

Hilda had failed to remedy the circumstances that caused them to remain out of the home. *See* § 8-533(B)(8)(c).

¶4 At the end of the third day of the severance hearing, the juvenile court made factual findings on the record relating to each of the grounds ADES had alleged. The court found there was insufficient evidence to terminate Hilda's rights based on chronic abuse of drugs or alcohol but that there was clear and convincing evidence on the remaining grounds. The court also found termination of Hilda's rights was in the children's best interests. As directed, ADES submitted and the court signed a formal order, which included many of the findings of fact and conclusions of law that the court had announced on the record. This appeal followed.

¶5 In order to terminate a parent's rights on the ground of mental illness, a court must find there is clear and convincing evidence "the parent is unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." A.R.S. §§ 8-533(B)(3), 8-537(B). Although ADES is not required to provide a parent with services that would be futile, a parent's rights may not be terminated on the ground of mental illness unless the evidence establishes ADES provided the parent with appropriate rehabilitative services. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 33-34, 42, 971 P.2d 1046, 1053, 1054 (App. 1999). Similarly, when a parent's rights are terminated based on either period of out-of-home placement, the evidence must establish "that the agency responsible for the

care of the child has made a diligent effort to provide appropriate reunification services." § 8-533(B)(8); *see also* § 8-533(D) (requiring court to "consider the availability of reunification services to the parent and the participation of the parent in these services" when termination is sought on ground of time in court-ordered, out-of-home care).

¶6 With respect to the ground of length of time in care, the juvenile court found ADES had

> made a diligent effort to achieve family reunification by offering the mother a psychological evaluation, individual counseling, substance abuse treatment, drug testing, mental health therapy and supervised visits. Mother's participation in services was minimal, except for her attendance at the psychological evaluation. Despite the offering of these services, family reunification could not be achieved.

In terminating Hilda's parental rights on the ground of mental illness, the court noted some of the services Hilda had been provided; the two evaluations, reports, and testimony of psychologist Dr. Carlos Vega; and the testimony of her individual counselor, who noted that Hilda had not changed despite undergoing counseling for approximately one year. The court also noted Hilda had been provided services designed for a person diagnosed with both mental illness and substance abuse and that she had quit that program after one month. The court reiterated its finding that ADES had made a diligent effort to achieve family reunification in connection with its finding that the evidence established by a preponderance that termination of Hilda's rights was in the children's best interests.

¶7 On appeal, Hilda contends the evidence did not support these findings. She argues that Dr. Vega, who had evaluated her in October 2007, had strongly recommended two services, neither of which ADES provided: evaluation of her medications by a psychiatrist, not a nurse practitioner, and individual psychotherapy, not just therapy with a counselor. A juvenile court may terminate a parent's rights only if it finds by clear and convincing evidence that a statutory ground for severance exists, §§ 8-533(B), 8-537(B), and finds by a preponderance of the evidence that severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, we "accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). Although there is reasonable evidence supporting the court's recitation of services ADES provided Hilda and the finding that those services were reasonable and appropriate, in light of Vega's testimony and reports, as well as the testimony of Hilda's caseworker and therapist, we conclude there was insufficient evidence that ADES had provided appropriate reunification services.

¶8 Dr. Vega testified that he first evaluated Hilda in October 2007. He took a case history from her and conducted various psychological tests, which "established the kind of exceptional difficulties that [she] was having." He concluded she would have "difficulties caring for children." Although Vega could not give a definitive diagnosis with respect to Hilda's substance abuse, he diagnosed her as suffering from borderline personality disorder,

not otherwise specified, with dependent features. He believed her disorder "ha[d] led to serious difficulties discharging her parental duties."

¶9 Dr. Vega testified further that, as he had stated in his October 2007 report, he had recommended Hilda be referred to a psychiatrist for reevaluation because she appeared to have "been engaging in drug-seeking behavior." What concerned him most, however, was that Hilda was taking the medication Adderall at the direction and under the supervision of a nurse practitioner rather than a psychiatrist. Vega testified, "In all honesty, I was petrified with the notion of a nurse practitioner giving her Adderall. Every college student knows that's the most popular stimulant and most abused stimulant around." He added, "She was somehow . . . diagnosed by this nurse practitioner as having Adult Attention Deficit . . . ." Hilda told Vega she had been given Adderall to stabilize her, which he testified he had "never heard of" in his life. Vega found this "highly disconcerting." He added, "I really felt that a psychiatrist needed to take a look at her and see what was going on here. So that was my first recommendation."[2]

¶10 Dr. Vega also testified that he had recommended in his October 2007 report that Hilda "needed fairly intensive psychological intervention. Her life was really coming unglued" and was "out of control." He explained, "And so I felt that they really, really needed those services to begin to see whether we could assist her and get her back on her

[2]In his October 2007 report, Vega stated, "My first recommendation is that [Hilda] be referred to a psychiatrist for reevaluation of her medications. It is important that this report accompany her to that psychiatric visit."

own two feet." He did not believe she "was . . . capable of parenting a child. She was barely capable of taking care of herself." Vega evaluated Hilda a second time a little over a year later, in November 2008. He administered the same tests, and the results of his evaluation were "fairly similar" to the results in October 2007. He testified that, "[B]y her own admission . . . she was at the same place she was a year earlier."

> She had not taken a step forward. She was living in a shelter. She was talking about having had little to no contact with the children. She came across as though she was still angry with CPS and . . . telling me that CPS had only begun to work with her a couple weeks earlier to begin reunification, which was basically ludicrous, and she was in agreement that she was unable and unwilling to take care of the children at that point. In other words, she wanted a lot more time. She was talking to me like . . . the kids would wait indefinitely, as far as she was concerned. And . . . her whole demeanor with regards to what was going on was highly disconcerting.

He explained that he had discussed with Hilda "the therapy that she supposedly had gotten, at least the one-on-one attention, she stated that all she did was vent her feelings. I'm sure it made her feel—maybe made her feel better, but she had no appreciation for the issues that needed to be tackled." His opinion about whether she could parent any child had not changed because there had been "[n]o change in her behavior."

¶11 During cross-examination by Hilda's attorney, Dr. Vega reiterated that one of his two "primary recommendations" was that she see a psychiatrist because he was "real concerned about that Adderall." He added that he is not a psychiatrist but has "been around long enough to know" that something was not "right." Counsel asked him to confirm that

he had also recommended "that she have regular counseling sessions with—with a psychotherapist." He clarified, "I recommended a psychotherapist. I didn't recommend counseling." When counsel asked, "So you did not recommend counseling by a regular counselor?" He responded, "No. I recommended one-on-one psychotherapy with a psychotherapist. There's a difference."

¶12 Tiffany Delbridge, Hilda's caseworker, testified that she had been assigned to the case in December 2007. She reviewed the kinds of services that had been offered since she had been assigned to the case: substance abuse and mental health evaluation and assessment through TERROS, individual counseling services through Dennis Lofgreen, supervised visits with Bobbijo and recently with Dakota, parent-aide services through Ameripsych, urinalysis, and case management services through CPS. She added that Hilda had completed the evaluation through TERROS for substance abuse and had been referred to the Ladders program, which is designed "for individuals of dual diagnosis of low substance abuse and mental health concerns."

¶13 Delbridge stated she relies on the recommendations of the psychologist after an individual has been evaluated. Based on the recommendations of Dr. Vega, she continued, she provided counseling with Lofgreen. She acknowledged Vega had wanted Hilda's medications evaluated by a psychiatrist and claimed that had been requested of TERROS. She stated,

> They did evaluate her during her assessment and that's when they referred to her to the Ladders program. As far as her

> medication, I know the case manager from TERROS stated they did want to have her medication evaluated and I'm not sure—I know [Hilda] continued that medication [for] some[]time after her assessment, so I'm not sure what the status of that evaluation was.

Delbridge acknowledged that, between the first and second psychological evaluations by Vega, Hilda had not "receive[d] one-to-one psychotherapy from a doctoral level psychologist." She also agreed Vega had been concerned in 2007 about Hilda's Adderall prescription and that Delbridge had asked TERROS for that evaluation. But, she said, the only information she received about that was "a verbal report from her case manager." She added, "They stated that they needed to follow up with the psychiatrist. [Hilda] did have medication monitoring through TERROS prior to the evaluation, and they were going to refer her to that nurse practitioner she had been seeing in order to evaluate that medication." When asked whether that was done, she responded, "I'm not sure if she—from her report [Hilda] did see a nurse practitioner in regards to her medication, however I believe she remained on the same medication."

¶14 During further cross-examination, Delbridge admitted it was "highly suggest[ed]" by Dr. Vega that Hilda receive a psychiatric evaluation. When asked whether "a psychiatric evaluation [was ever] scheduled by CPS that was or was not attended by [Hilda]," she responded,

> No. We did not ever schedule a psychiatric evaluation. She was being—being seen by TERROS prior to us having the case and so I did sit down with [Hilda] and request that she herself request a psychiatric evaluation in order to have her medication

> looked at. And then also when we did the referral to TERROS, they did that as well.

She conceded, too, that when such an evaluation is recommended, normally CPS made the appointment and informed the patient of the date. That was not done in this case, and she was not aware of any time during the case that Hilda saw "an actual doctor at TERROS." Rather, she understood Hilda continued to see a nurse practitioner. Asked if a medical doctor had evaluated Hilda's prescriptions at any point, Delbridge answered, "I do not know. I know she did say she had an evaluation and they took her off all her medication and that was a couple months ago, but I don't know if it was a doctor or nurse practitioner." Delbridge had discussed having a doctor evaluate Hilda when she got the case, and "they stated that they were recommending that," but Delbridge never asked whether that had happened.[3] She also agreed Lofgreen was not authorized to prescribe medication.

¶15 Derek Lofgreen testified he has a master's degree in education, is a "licensed professional counselor," and had worked with CPS for eleven years. He was assigned to work with Hilda based on Dr. Vega's recommendation in October 2007 that Hilda "had some

[3]Among the exhibits presented at the severance hearing are monthly reports from TERROS, beginning as early as 2006. The type of service is described as "Med Management-MD/DO." The notations reflect Hilda discussed her medications with a TERROS staff member. The staff member who conducted the reviews and signed the reports appears to have been a nurse practitioner. The only indication we found in the record reflecting that a medical doctor may have reviewed Hilda's medications are four psychiatric progress notes that appear to predate Dr. Vega's October 2007 evaluation, report, and recommendation that Hilda receive a psychiatric evaluation and review of her medications.

personality disorder tendencies." Lofgreen's focus was "on her personality disorders and how that impacted her life as far as probably her parent history, illegal drug use, transiency and her marital relations." He focused on her alleged illegal use of drugs, her medications, and her living situation. Asked whether he is qualified to direct a patient to take medication or to prescribe medication, he conceded he was not. And he never advised Hilda or CPS to have Hilda receive other psychiatric evaluations for the purpose of prescribing any medications.

¶16 In its answering brief, ADES does not directly respond to Hilda's argument that ADES failed to follow the recommendations of its own expert by providing the two services he insisted were crucial. Rather, ADES simply reviews the evidence regarding the services Hilda was provided and asserts that evidence supports the juvenile court's findings that ADES diligently had provided appropriate and reasonable reunification services. That other appropriate services were provided does not change the fact that here, as in *Mary Ellen C.*, ADES did not follow the uncontradicted recommendations of its own expert. *See* 193 Ariz. 185, ¶ 35, 971 P.2d at 1053. Dr. Vega could not have been more clear; he was concerned about Hilda's use of Adderall and the fact that it appeared to have been monitored and likely prescribed by a nurse practitioner. He made it unequivocally clear that a psychiatrist, that is, a licensed medical doctor, had to evaluate Hilda's medications. He also made it clear that Hilda needed a psychotherapist. Although she received one-on-one counseling with Lofgreen, apparently he is not a psychotherapist. And the lack of these two services could

have impeded Hilda's ability to benefit from other services and make progress toward reunification.

¶17 Like the court in *Mary Ellen C.*, we find "[t]his case . . . troubling." 193 Ariz. 185, ¶ 43, 971 P.2d at 1054. Hilda does not challenge the juvenile court's finding that termination of her rights is in her children's best interests, and there was an abundance of evidence to support that finding. Additionally, ADES did provide her with a panoply of services, and the evidence was virtually undisputed that she was unable to parent the children at the time of the hearing. Nevertheless, we must reverse the termination order for the reasons stated and remand this matter for further proceedings.

_____
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Presiding Judge

_____
ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).